United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7131

ORIGINAL

To be argued by
SAM PANISH

In The

United States Court of Appeals

For The Second Circuit

JOHN A. GAVIN,

Plaintiff-Appellee,

vs.

TECHNICAL TAPE, INC., and TUCK INDUSTRIES, INC.,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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FOR THE SECOND CIRCUIT

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- against -	Docket No.75-7131
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BRIEF OF DEFENDANTS-APPELLANTS

Statement of the case

This is an appeal by the defendants from a final judgment entered in the above-entitled action on January 13, 1975, of the United States District Court for the Southern District of New York, Hon. Edward Weinfeld, District Judge, as amended by order dated February 21, 1975, which order also denied the defendants post-trial motion for a new trial. The decision below is not officially reported.

QUESTIONS PRESENTED

There are several substantial issues to be resolved in connection with this appeal which are as follows:

1. Whether the claimed discharge of the plaintiff-employee was wrongful or whether there was a tender of resignation and an acceptance.

2. If the plaintiff is entitled to recover whether it should have been under the second claim of the complaint, i.e. the stipulated damages as specified in the agreement, or under his then salary.

3. Whether the mitigation defense was properly considered and the damages correctly computed in accordance with law.

Statement of Facts

The plaintiff (employee) sued the defendants (employer)(hereinafter referred to as "defendant") on four (4) separate claims:

1. The first claim for breach of an employment agreement in the sum of $48,082.19;

2. The second claim to recover $35,000.00 for severance pay, pursuant to a written contract;

3. A claim for a 2 1/2 % incentive bonus by reason of any increment of fiscal 1972 net income over fiscal 1971 net income;

4. A claim for a declaratory judgment as to the bonus of 2 1/2% for fiscal 1973 over 1971.

Since the trial Court found that the plaintiff is entitled to recover on his first claim, which was for wrongful discharge, it held that the plaintiff is not entitled to severance pay, as alleged under his second claim. No award was made to the plaintiff under his third claim, in that it was found that he failed to sustain his burden of proof. The fourth claim was dismissed in that there was no evidence to sustain it (460a-461a). The plaintiff did not appeal from the dismissal of the third and fourth claims.

The amended answer of the defendant in addition to a denial of the material allegations of the complaint contains two (2) affirmative defenses consisting of estoppel and waiver.

The employment (P's Exh.1) agreement by its terms employed the plaintiff as the senior vice president and chief operating officer of the defendant for a period of three (3) years commencing April 5, 1971 and ending April 5, 1974 at a fixed salary, at the rate of $35,000. per annum, payable in equal monthly installments at the end of each month. It further provides that if defendant should terminate the plaintiff's employment under certain specified conditions, then he is to receive severance pay

in the amount of $35,000. per annum until April 5, 1974. The said employment agreement provides (para.6) that "no modification or termination of this Agreement shall be valid unless in writing and signed by GAVIN and the COMPANY."

The plaintiff failed to produce any written agreement executed by both parties other than the employment agreement of April 5, 1971, despite a contrary allegation in ¶6 of the complaint. Plaintiff admitted that there was no writing signed by the parties which modified the employment agreement of April 5, 1971.

During the course of the plaintiff's employment, certain events occurred whereby there were many changes and modifications to the employment agreement even though there was never any writing executed by both parties setting forth those changes. The modifications and changes consisted of, among other things, the following:

1. An increase in plaintiff's salary from $35,000. to $50,000. per annum. The approval of this salary took place at a special meeting of the board of directors held on April 25, 1972 (P's Exh.3) and was

made retroactive to April 4, 1972.

2. At the same board meeting it was voted that the plaintiff would be entitled to receive 2 1/2% of the increment of net income from operations for the fiscal years 1972 and 1973 over the net income from operations for the fiscal year 1971, subject to certain limitations and exclusions of the board of directors.*

3. The time when compensation was payable to the plaintiff was changed from monthly to weekly.

4. The defendants paid for the medical, surgical, major medical and disability insurance for the plaintiff and his family (not otherwise referred to in the employment agreement-P's Exh.1;D's Exh.A).

5. The plaintiff received a bonus of $8,000. on or about January 29, 1972.

6. The plaintiff received a bonus of $2,000. on or about April 15, 1972.

---

* These claims were dismissed on the merits (460a-461a).

7. The plaintiff was elevated in position from senior vice president to president (P's Exh.2).

8. The plaintiff was made a member of the board of directors (P's Exh.2.).

9. The plaintiff received certain stock options for the common stock of defendant, Technical Tape, Inc., a publicly held corporation (P's Exh's 3 and 5).

10. The plaintiff was elected as a member of the executive committee of the board of directors of the defendant (P's Exh.2).

Prior to the commencement of this action, the plaintiff terminated his employment and resigned therefrom which resignation was accepted by the board of directors of defendant at a meeting held on April 6,1973 (D's Exh.S). Further, in order to settle any differences between the parties, the defendant paid and the plaintiff accepted a check in the sum of $1,538.46 (D's Exh.G) in full satisfaction and discharge of any claims that the plaintiff might possibly have which encompasses and includes the first and second claims in the complaint herein.

The various modifications of the 1971 written employment agreement together with the resignation by the plaintiff and the acceptance of it by the defendant, took place in a manner no different than the other modifications whereby the plaintiff received an increase in salary and the other benefits enumerated. The defendant could not compel the plaintiff to continue his employment after he tendered his resignation, which was accepted by the defendant.

ARGUMENT

P O I N T I.

THE DEFENDANT DID NOT DISCHARGE THE PLAINTIFF FROM HIS EMPLOYMENT.

The lower Court heard this case non-jury. It found as a fact that "even if there was a waiver of the written termination provision, the plaintiff did not orally resign or offer his resignation to the defendants"(457a). This issue must however be resolved in accordance with the agreement dated April 5,1971 (P's Exh.1). It is there specifically provided in ¶6 that "No modification or termination of this Agreement

shall be valid unless in writing and signed by GAVIN and the COMPANY." A fair reading and interpretation would simply mean that both parties must sign a writing in order to change the agreement. However, the trial Court in its findings stated that there have been numerous modifications without a writing executed by both parties (456a-457a). Since the parties acted upon all those modifications, many of which were made solely at a board of directors meeting, similar applications should be made as to the termination acceptance of plaintiff's employment at a board of directors' meeting held on April 6, 1973(D's Exh.S).

The point is that equal applications should be given to the action of the board of directors since it is in both instances that is, a modification or a termination which requires a writing by both parties and it is so set forth in one and the same sentence of the written agreement. In addition, on the evidence adduced at the trial, each member of the board of directors that was present at the meeting and all of whom testified, understood that there had been a resignation given by the plaintiff.

It is submitted, that it is of no moment, that the plaintiff was not present during the afternoon session of the board meeting on April 6, 1973. A quorum was present at that session, so that even if the plaintiff attended the afternoon session, he would have been outvoted by four (4) to one (1). It therefore was a distinction without a difference as to whether the plaintiff's physical presence was required or not. The resolution passed by the board and its acceptance of the plaintiff's resignation during the afternoon session of the meeting of April 6, 1973 was in effect merely a ministerial act (D's Exh.S).

It is submitted that the District Court erred in its findings when it stated that the minutes made no mention that at the board meeting the plaintiff denied that he had offered to resign or that he had issued a ultimatum (459a). In respect to this (D's Exh.S) states as follows:

> "Mr. Gavin and Mr. Gerald Sprayregen then disagreed as to whether or not such ultimatum had been issued. Mr. Herman Sprayregen then asked Mr. Gavin to state to the Board whether, in fact, he had made such a statement. Subsequently, Mr. Gavin acknowledged that he had, in fact, made the statement attributed to him by the Chairman".

The finding of fact that the plaintiff did not tender or in fact actually resign from his position is contrary to the weight of the evidence. The continued meeting of the board on April 6, 1973 during the afternoon session significantly attested to the resignation by the plaintiff and its acceptance by the board. It was so understood by each and every member. The plaintiff in fact signed a waiver in respect to that meeting and was therefore bound by each and every resolution that was passed, even though he may have only been present during the morning session (waiver attached to D's Exh.S).

It is submitted that it is obviously impossible, or at least impractical to require an employer to obtain a written resignation from an employee when the latter resigns under circumstances filled with such acrimony as is apparent in the record. Equity "will not compel or direct the performance of a futile, vain, useless, or impossible act." 20 N.Y. Jur., Equity ¶98,p.120.

Upon a reading of the record as a whole and taken in its proper contextual setting, it appears that the defendant did not discharge the plaintiff from his employment.

P O I N T II.

THE PLAINTIFF WAS NOT ENTITLED TO RECOVER UNDER THE FIRST CLAIM OF THE COMPLAINT.

The first claim in the complaint is for breach of the employment agreement in the sum of $48,082.19 and the second claim is to recover for severance pay pursuant to that agreement in the sum of $35,000.. If it is upheld that the plaintiff is entitled to recovery then that should be resolved pursuant to and controlled by the provisions of the written employment agreement. It is provided in ¶2 thereof (P's Exh.1):

> "* * * Should the COMPANY at any time from April 5, 1971 to April 5, 1974 terminate GAVIN'S employment for any reason whatever, including but not limited to GAVIN's inability to perform, merger, dissolution or sale of stock or assets of the COMPANY, GAVIN will receive severance pay in the amount of $35,000.00 per annum, payable in equal monthly installments at the end of each month until April 5, 1974."

The parties are bound by this clause as and when it was entered into by them and it should not be disregarded. There was never any modification of the agreement providing that in the event of plaintiff's termination by defendant then the plaintiff would receive severance pay in the amount of his then salary. It is contrary to the specific and unambiguous provision of the written agreement. The plaintiff was awarded the full amount of the salary as modified, i.e. $48,082.19 diminished by his earnings leaving a net of $41,218.46 (516a).

In order to give effect to the terms of the termination clause it must encompass any type of a discharge. This would even include a discharge found to be wrongful. If it is found that the plaintiff resigned or if his discharge was justifiable, then there could be no recovery whatsoever, not even for the $35,000. severance pay provision. The agreement is clear that the defendant had the right to terminate the employment of the plaintiff at any time and for any cause. The legal consequences of any such termination, if it was found to be wrongful

on the part of the plaintiff would be a foundation for him to recover at the stipulated rate of $35,000. per annum. That would be the sole extent of the defendant's liability as specifically bargained for and agreed to by the parties. The learned District Court Judge took into consideration the events which occurred subsequent to the execution of the subject agreement in order to arrive at the plaintiff's damages, i.e., it found that his damages should be based upon the increased salary of $50,000., instead of basing it on the stipulated and liquidated damages specifically and unambiguously provided for in the termination clause of the written employment agreement in the amount of $35,000. for the remaining term of it.

This case is based upon diversity of citizenship and therefore local law would be applicable. It has been held in Frankel's Carpet Fashions, Inc. v. Abraham, 228 N.Y.S.2d 123,125-126, N.O.R. as follows:

> "Whether an amount stipulated in an agreement is to be considered as liquidated damages or a penalty must be determined as of the time that the agreement was entered into between the parties and not by events subsequent thereto(curtis v. Van Bergh,161 N.Y.47,55 N.E.398; Dunn v. Morgenthau,73 App.Div. 147,76 N.Y.S.827,affd.175 N.Y.518,67 N.E. 1081; Yonkers-Cameo,Inc. v. Shusterman et al.,City Ct., 16 N.Y.S.2d 260 [not officially reported])."

Then the same Court stated (p.126 of 228 N.Y.S. 2d):

> "Liquidated damages constitute the compensation which the parties have agreed must be paid in satisfaction of the loss or injury which will follow from a breach of contract(Wirth & Hamid Fair Booking, Inc. et al. v. Wirth et al., 265 N.Y. 214, 223 192 N.E. 297, 301) * * * A liquidated damages clause presupposes an agreement between the parties for the payment of a sum certain upon the breach of contract(Wirth & Hamid Fair Booking, Inc.., supra). * * * The landlord may not in one breath claim liquidated damages and then seek actual damages in addition to liquidated damages(see: New York Dock Co. v. City of New York et al., 246 App.Div. 620, 283 N.Y.S. 2; Smith v. Vail, 53 App. Div.628, 65 N.Y. S. 834)."

In an erudite opinion written by Mr. Justice Bergan (later New York Court of Appeals Judge) on damages in the case of Callanan Road Improvement Co. v. Colonial S. & S. Co., 190 Misc. 418, 72 N.Y.S. 2d 194 stated that Courts in even early cases noted that there was vast disagreement. The Court stated(p.196 of 72 N.Y.S. 2d):

> "Chancellor Walworth, writing in 1839 for the Court of Errors in Williams v. Dakin, 22 Wend.201, 213, expressed the view that in dealing with the purpose of parties to provide a liquidated amount for damages, the court ought not to try to make a better or a different agreement for the parties than they intended to make for themselves."

* * * *

"*the amount of agreed damage for a breach of contract to pay a fixed sum of money cannot exceed that amount plus lawful interest*."

Then the same Court stated that some times there is difficulty in ascertaining intent but in that case the contract was explicit in the use of words to the effect that liquidated damages were what the parties had in mind.

Again, that Court stated (pp.197-198 of 72 N.Y.S. 2d):

"It is consistent with public policy and with judicial policy for parties to agree in advance on their damage, as surely as they could do after a breach, and to provide against the trouble and expense of future investigation. These principles were stated both by the Chancellor for the Court of Errors and by the Chief Justice of the Supreme Court in the litigation between Dakin and Williams. See 22 Wend. at page 213 and 17 Wend. at pages 454, 455."

As to the time when the damages are to be computed the same Court states(p.199 of 72 N.Y.S. 2d):

"The validity of the agreement is to be tested as of the time when made."

* * * * *

"The parties fixed their own obligations with intelligence and with a knowledge both of the subject with which they dealt and what would be reasonable to expect as damage flowing from a breach. I do not see any good reason for a court to try to improve on what they agreed to do; or any judicial ability to deal more sensibly with the subject; or any authority in the court to declare invalid what it was plainly their right to engage to do and which they undertook to set out plainly in writing."

P O I N T III.

THE PLAINTIFF CANNOT RECOVER IN EXCESS OF THE SUM STIPULATED AS DAMAGES BY THEIR OWN WRITTEN AGREEMENT.

The lower Court awarded to the plaintiff "damages based upon his salary of $50,000. for the balance of the contract period, plaintiff is not entitled to severance pay as alleged under his second claim."(460a). It is fundamental that the Court must look at the underlying agreement before there is a determinative issue in respect to damages. It has been held in the case of In re Rosenberg's Estate,36 Misc2d 439, 233 N.Y.S.2d 39,42:

> "It has long been established that 'When the parties by their contract provide for the consequences of a breach of contract, lay down a rule to admeasure the damages, and agree when they are to be paid, the remedy thus provided must be exclusively followed.'(14 N.Y.Jur.§156,citing McCready v. Lindenborn, 172 N.Y. 400,65 N.E.208; Read v. Fox,119 App. Div. 366,104 N.Y.S. 1133)."

In the event this Court confirms that the plaintiff is entitled to recover damages the only issue presented is whether the clause in the contract providing for a severance pay is a liquidated damage clause or a penalty. Since the defendant for the purposes of this brief does not argue that the clause is a penalty then certainly the plaintiff cannot use that argument in its favor.

As was stated by Mr. Justice Shapiro in Jarro Building Industries Corp. v. Schwartz,54 Misc.2d 13, 281 N.Y.S. 2d 420,422:

> "Generally, courts will enforce a clause in a contract whereby the parties stipulate as to the damages to be paid in the event of breach unless the clause is characterized by the court as a penalty.(5 Corbin on Contracts, §1058.)
>
> 'Whether a provision for the payment of a sum of money by one party to the other,in a contract * * *is, in the event of default to be construed as a penalty or as liquidated damages has given rise to a great variety of judicial utterances. It has been said that if there is any branch of the law inveighed against for uncertainty deserving of such a reproach, it is this subject of the distinction between penalties and liquidated damages * * *'"

Therefore an affirmance of recovery should be on the second claim which is the liquidated damage clause. The extent of the recovery cannot go beyond the rate of $35,000. as agreed to by the parties (¶2 of Employment Agreement - P's Exh.1). The parties specifically mandated that if there was a termination "for any reason whatever" the extent of damages to the defendant will be based upon the sum of $35,000. per annum.

In a situation almost parallel to the one at bar, wherein the plaintiff in his complaint sued his employer for damages for breach of contract in excess of the stipulated twelve month salary and on a cause of action to recover the damages provided for in the agreement, it was held in Burg v. ARCS Industries, Inc.,36 A.D.2d 695,318 N.Y.S.2d 906,907 (Appellate Division 1st Department):

> "The first two causes of action in plaintiff's complaint are predicated on an alleged brach by defendant of a written employment contract between the parties. The terms of that agreement are clear and unambiguous and provide that it is terminable at will by either party, without cause, but,should such termination occur at defendant's behest, on or before a stated date, plaintiff

> would be entitled to twelve months salary. Plaintiff, claiming to have been dismissed without cause, prior to the date fixed in the agreement, seeks, in his first cause of action, to recover those damages provided for in the agreement. The legal sufficiency of this cause of action is not challenged. Plaintiff's second cause of action, which seeks far greater damages, based upon breach of the same employment agreement, is insufficient in view of the contractual limitation agreed to by the parties. Plaintiff is fully protected by his first cause of action."

By parity of reasoning the plaintiff in the instant case was fully protected in his second claim in the suit for liquidated damages in the sum of $35,000.00. It appears that the trend of the cases is that a liquidated damage clause if not a penalty is enforceable especially where, as here, that amount is lesser than one arising out of a breach and which is unliquidated.

In the case of Nodine v. State, 192 Misc.572,79 N.Y.S.2d 834,842, the Court quoted from a former New York Court of Appeals case when it held:

> "It is stated in McCready v. Lindenborn,172 N.Y. 400,65 N.E. 208,211,that ' * * * when the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages,

> and agree when they are to be paid, the remedy thus provided must be exclusively followed.' In the instant case, claimant and his contractor did more than just lay down a rule to measure the damages and to agree when they were to be paid. They actually agreed upon the amount thereof."

In an action on an employment agreement wherein the plaintiff sought to recover damages flowing from a breach of contract and the defendant sought to limit the claim of the plaintiff in accordance with a certain paragraph of the employment contract concerning damages, the Court in Songer v. Mack Trucks, Inc.,23 A.D.2d 544, 256 N.Y.S. 2d 313,315, had this to say:

> "In any event, even had plaintiff not yet been employed and had there been an anticipatory breach, the provisions of paragraph 11 would still limit the amount of any recovery available to him. There is no dispute but that defendant could have terminated plaintiff's employment immediately after he undertook the actual performance of his duties. Nor is there any disagreement that in such a situation his recovery would be limited by paragraph 11. We see no reason why, even if there were an anticipatory breach, the measure of damages could be any greater than that which would follow from a termination of the contract at the earliest possible time after the commencement of performance (see Robertson v. Charles Frohman,Inc., 198 App.Div.782,191 N.Y.S.55)."

It is, therefore, respectfully submitted that the finding and conclusion made by the lower Court that the plaintiff is entitled to recover on his first claim in the sum of $48,082.19 is erroneous (516a).

P O I N T IV.

THE MITIGATION DEFENSE AS AGAINST THE DAMAGES IN TOTALITY WAS NOT PROPERLY CONSIDERED.

It has been heretofore pointed out in the preceding point that at most in the event of a finding in the favor of the plaintiff, the threshold amount should be in the sum of $35,000.00. As against this, the defendant is entitled to a reduction on its mitigation defense.

During the period from April 6th, 1973 to April 5th, 1974, the plaintiff in addition to rendering certain consultative services did venture into a new business of his own. This was in active competition with the defendant. The plaintiff made an election to take a risk in the business world by

entering into the business of Encore Tape & Label. The defendant should not stand as a surety for the plaintiff against any loss which may be incurred by him. Any profits in excess of the damages found by this Court would not redound to the benefit of the defendant. Similarly, any losses sustained by the plaintiff should not be reaped by the plaintiff against the defendant. The defendant is neither an insurer, nor a partner of the plaintiff in the business risk which he undertook. Once the plaintiff took the risk of entering into his own business he condoned, or waived his right to recovery of damages.

On a finding that the plaintiff is entitled to a gross recovery of liquidated damages in the sum of $35,000., then from this amount, the defendant is entitled to a credit of $23,111.(461a)which was his income during the one (1) year period in question without considering the amount that was deducted in the plaintiff's business loss of $14,884.(461a). There is a net difference in favor of plaintiff in the sum of $11,889.00. That would be the extent of the

plaintiff's recovery which, however, the defendant does not concede. It is only pointed out for purposes arguendo.

In a concurring opinion, by Judge Cardozo, the case of McClelland v. Climax Hosiery Mills,252 N.Y. 347,359,169 N.E. 605,609 clarified the rule that is imposed upon an employee of accepting other employment thus:

> "The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this, that if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation,and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer."

It is clear in the record that the defendant has met its duty of coming forward with proof so as to reduce the damages of the plaintiff. It is only fair that if the plaintiff made any profits out of his business during the contract period they should be applied in reduction of damages. The defendant however, is not a venturer or an insurer of the risk that the plaintiff

undertakes and therefore, should not be penalized in respect to losses. If the plaintiff made no profits whatsoever in his business, but only sustained losses, it would be unfair, inequitable and unjust to charge the defendant and credit the plaintiff with the amount of the loss in addition to the liquidated damages set forth in the contract. It would clearly present a case where the plaintiff could recover in excess of an amount stipulated in the contract entered into between the parties.

The question concerning the effect on damages of an employee going into business for himself was discussed in Richardson v. Hartmann,68 Hun,9,22 N.Y.S. 645,646 wherein it was stated:

> "It has been recently passed upon by the general term of the court of common pleas in the case of Toplitz v. Ullman,(Com.Pl. N.Y.)20 N.Y.Supp.863; and it was therein held that a person,under contract of employment for a definite term,wrongfully discharged,who, after endeavoring unsuccessfully to procure other employment, embarks in business on his own account, is entitled to have his damages measured by the amount of the agreed wages he was prevented from earning,less his share of the profits in the business into which he had entered."

It is the profits that were allowed to be used in reduction of the damages sustained. The plaintiff was not credited with his losses. If the employee's efforts are unsuccessful in part, then they are not considered. In Mohawk Sausage & Provision Co. v. Hygrade Food Products Corp., 1 Cir.,1932,61 F.2d 425, 427 the Court had this to say:

> "The rule of damages in such cases is well settled. The plaintiff is entitled to recover the amount of the contract price, less such offsetting income as he actually makes or in the exercise of reasonable diligence he should receive. Fruitless efforts to obtain employment or to make money by engaging in business do not mitigate the damages."

In the instant case, the Court deducted the amount of the plaintiff's business loss in the sum of $14,884. (461a) from his earnings and profits of $23,111.(461a). It is submitted that this was error.

P O I N T V.

THE DEFENDANT'S POST-TRIAL MOTION TO AMEND THE OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED.

The proposed amended findings in defendant's post-trial motion were commented upon (466a-475a). This included the basic issue as to the measurement of damages with particular reference to the employment agreement(P's Exh.1,¶2). In its order of February 21, 1975, concerning the post-trial motion, (514a-516a) the Court for the first time made the observation that the severance pay provision, i.e., the $35,000. per annum rate, is not a liquidated damage clause and that there was a failure to plead it as an affirmative defense under F.R.C.P.8(c) and so resulted in a waiver of the defense(515a). It is submitted that this result is without substance.

In connection with affirmative defenses set forth in Rule 8(c) specific reference is made to those defenses that constitute matter in avoidance. Although the list is far from complete, it fails to mention that matter in mitigation must be pleaded. The plain[illegible]

has to sustain the burden throughout the trial concerning the damages which he sustained. As part of the plaintiff's evidence-in-chief, the employment agreement must be submitted in evidence or testified to as was done in the instant case. Once the agreement was admitted into evidence, then all of its terms became applicable. In the construction of the said agreement and in the absence of ambiguity, it was the duty of the Court to determine its meaning. In actuality, the terms and the language of the contract are not disputed. Therefore, its legal effect is a question of law to be determined by the Court. It was therefore up to the Trial Court, in making his determination once he found that the plaintiff was entitled to recover, to apply the proper measure of damages as ascertained within the four corners of the agreement. It has already been demonstrated that ¶2 of the agreement is the liquidated damage clause that the parties bargained for at the time

the agreement was entered into and is the paragraph that should have been held to be applicable under the Court's finding. There was no objection during the trial as to the defendant's mitigation defense nor that the liquidated damage clause in the agreement had to be affirmatively pleaded. It was raised for the first time by the plaintiff in opposition to the defendant's post-trial motion. If such defense was therefore at all necessary to be affirmatively pleaded, it was waived by the plaintiff on the admission of the evidence during the course of the trial without objection.

C O N C L U S I O N

It is submitted that the judgment of the District Court should be reversed and the complaint dismissed.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
for the Second Circuit

JOHN A. GAVIN,

Plaintiff-Appellee,

- against -

TECHNICAL TAPE INC., etal.,

Defendant-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York** *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the **1stx** *day of* **May** *1975 at* **R 530 Fifth Ave, N.Y. N.Y.**

deponent served the annexed Brief *upon*

Parker Chapin & Flattau

the **Attorneys** *in this action by delivering* 2 *true copy* es *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this **1st**
day of **May** *19* **75**

Robert T. Brin

James Steele
JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977